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# Judges Bound by the Law: A Case Study of the Unconstitutional Misapplication of the Judicial Conduct and Disability Act of 1980 and a Proposal to Prevent Future Misapplications

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# JUDGES BOUND BY THE LAW: A CASE STUDY OF THE UNCONSTITUTIONAL MISAPPLICATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980 AND A PROPOSAL TO PREVENT FUTURE MISAPPLICATIONS

## I. INTRODUCTION

Perhaps no single institution embodies the American notion of justice more than the judiciary. To the layperson and lawyer alike, judges are expected to apply the law evenhandedly to the situation before them and to resolve disputes in an expeditious and competent manner. Theoretically and practically, the American system of jurisprudence relies upon judges' abilities to accurately marshal principles of law, to shepherd those who come before the courts either as litigants or witnesses, and to ensure that findings of fact are supported by appropriate evidentiary bases. To label judges the cornerstones of the American justice system is not mere hyperbole given their responsibilities in any given case.

The problem, of course, is that judges are no more infallible than any other person who transverses the gates of a courtroom. The fact that judgeships are jobs essential to the unremitting operation of the government does not mean that those who occupy the positions are impervious to mistakes that inevitably occur in any profession. Sometimes, however, a judge does not simply mistakenly apply the law or wrongfully vituperate an officer of the court. It is possible, after all, that a judge may view his position, with all its accoutrements of a monarchy limited to one room, in such a manner as to abrogate his responsibilities by engaging in conduct that is inimical to the administration of justice. Accompanying the power of the judiciary is the very real possibility for institutionalized despotism—i.e., a pattern of judicial misconduct that is so inveterate to a particular court as to have inured into an effective obstruction of justice by inhibiting litigants and destroying efficient adjudication of claims. Certainly judges are exposed to enticing temptations, and as the federal judiciary continues to grow the possibilities for misconduct become more and more prevalent.

In an attempt to suppress these possibilities while reinforcing the role of judges *qua* public servants, Congress enacted the Judicial Conduct and Disability Act of 1980 (the Act),[1] which created a mechanism for investigating

1. Pub. L. No. 96-458, 94 Stat. 2036 (codified as amended at 28 U.S.C. § 372(c)(2000)).

and disciplining federal judges whose conduct is "prejudicial to the effective and expeditious administration of the business of the courts."[2] The Act clarified the previously unresolved issue of whether a judicial council, initially created to administer the business of the courts within its circuit, had the power under section 332 to censure a judge for judicial misconduct.[3] In addition, section 372(c)(6)(b) of the Act enumerates the sanctions that a judicial council may impose in the event that it finds a judge has committed an act egregious enough to fall under the statutory language.[4]

Perhaps the most significant application of the Act since its inception occurred when the Judicial Council of the Fifth Circuit, investigated and disciplined Judge John H. McBryde of the Northern District of Texas in 1997.[5] While Judge McBryde's story certainly entails conduct that is questionable to even those imbued with court experience, it also entails a tenuous application of the very statute that was enacted in order to prevent the judiciary from overstepping its constitutional bounds.[6] In *McBryde IV*, the Court of Appeals for the D.C. Circuit held that the Act was constitutional, both facially and as applied by the Judicial Council to Judge McBryde.[7] The majority decision in *McBryde IV* allows for unconstitutional applications of the Act by holding that the review preclusion clause effectively bars review in the courts of as-applied constitutional challenges and by implicitly upholding the nebulous standard outlined in the Act.[8] This Note will review the facts that supported the Judicial Council's imposition of disciplinary action on Judge McBryde; Part III will recount the history leading up to the Act and restate the provisions of the Act

2. *Id.*

3. *In re* McBryde, 117 F.3d 208, 226-27 (5th Cir. 1997) [hereinafter McBryde I]. For the purposes of this article and for the sake of clarity, the Texas cases involving Judge McBryde will be distinguished from the D.C. cases as follows: *In re* McBryde, 120 F.3d 519 (5th Cir. 1997) [hereinafter McBryde II]; McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the United States, 83 F. Supp. 135 (D.D.C. 1999) [hereinafter McBryde III]; McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the United States, 264 F.3d 52 (D.C. Cir. 2001) [hereinafter McBryde IV].

4. *See* § 372(c)(6)(b).

5. For a complete recitation of the facts leading up to the disciplinary proceedings leveled against Judge McBryde, see *McBryde I*, 117 F.3d at 209-17; *McBryde III*, 83 F. Supp. at 140-49.

6. For a discussion of the purposes of the Act, see *infra* Part III(A).

7. *McBryde IV*, 264 F.3d at 55.

8. The standard employed in the Act appears in § 372(c)(1):

> Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in *conduct prejudicial to the effective and expeditious administration of the business of the courts*, or alleging that such judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct. (emphasis added).

germane to the McBryde saga; Part IV will then develop the lines of analysis the majority and dissent relied upon in *McBryde IV*; and finally Part V will analyze the constitutionality of the Act, focusing specifically on the preclusion clause[9] and on the standard delineated in the Act, and will conclude with a proposed standard to be applied by judicial councils faced with complaints filed under the Act.

## II. THE STORY OF JUDGE JOHN H. MCBRYDE

Judge McBryde, United States District Judge for the Northern District of Texas, began to encounter opposition to the manner in which he conducted judicial proceedings in spring of 1995.[10] At this time two cases, *United States v. Satz*[11] and *Torres v. Trinity Industries, Inc.*,[12] were pending before Judge McBryde.[13] These cases sparked an investigation of Judge McBryde and his notoriously stringent methods of operating[14] that will in all likelihood not end until reviewed as a last resort by the Supreme Court.

The *Satz* case arose out of an investigation into an organization that fraudulently provided loan referrals to individuals with substandard credit.[15] The organization thrived by charging the individuals an advance referral fee and by operating in numerous states.[16] Satz was indicted in both Phoenix, Arizona and Fort Worth, Texas.[17] Following a plea bargain by three of Satz's co-conspirators, Judge Rosenblatt in Arizona issued a sealing order for all matters pertaining to the plea proceeding.[18] Judge McBryde wished to go forward with sentencing in Texas, thereby denying Assistant United States Attorney Umphres' motion for a continuance.[19] Through a series of hearings to resolve Umphres' motions, Judge McBryde learned that the State was looking for a continuance to allow time for the Arizona investigation to expand and to avoid possible issues of double jeopardy.[20] He ultimately found

9. Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2036 (codified as amended at 28 U.S.C. § 372(c)(10)). *See infra* note 44.

10. *McBryde I*, 117 F.3d at 209-11, 214-15.

11. The facts pertaining to the organization and its scheme of which Satz was a part are detailed in *United States v. Gray*, 105 F.3d 956, 961-62 (5th Cir. 1997), *cert. denied*, 520 U.S. 1150 (1997).

12. Torres v. Trinity Indus., Inc., No. 4:90-CV-812-A (N.D. Tex. 1995), *available at* http://pacer.txnd.uscourts.gov.

13. *McBryde I*, 117 F.3d at 209.

14. *See McBryde III*, 83 F. Supp. at 142.

15. *See supra* note 11.

16. *Id*.

17. *McBryde I*, 117 F.3d at 209.

18. *Id.* at 210.

19. *Id.*

20. *Id.* at 211.

Phoenix AUSA Cerow in contempt of court for failure to answer questions pertaining to the sealing order in an attempt to have sentencing occur in Arizona first.[21] Judge McBryde, moreover, found that no sealing order in fact existed in Arizona, based on the demeanor of Cerow and Umphres and in spite of correspondence by Judge Rosenblatt expressly indicating the contrary.[22] Finally, Judge McBryde ordered the text of Umphres' motion, which included information that had been sealed by Judge Rosenblatt regarding the co-conspirators' guilty pleas and their willingness to assist prosecutors, revealed to Satz and his counsel.[23]

The *Torres* case arose out of the death of Raimundo Torres, and resulted in a settlement reached by the parties.[24] The final judgment ordered the defendant to pay Grecia Torres, at the time a minor, $40,000 and the Clerk of the Northern District to invest the money in an interest bearing account at the highest available interest rate until Grecia Torres reached maturity.[25] Following a communication breakdown between plaintiff's attorneys and a financial deputy for the Court, the $40,000 mistakenly rested in the court's treasury for more than three years, earning no interest.[26] The office of Nancy Doherty, Clerk of the Northern District, discovered the mistake and Doherty alerted Judge McBryde.[27] Based on the advice and assistance of the Administrative Office of the United States Courts, Doherty sought to reimburse Torres' account via a Federal Tort Claims Act[28] action.[29] Judge McBryde disagreed, and maintained that Torres should be made whole through the court.[30] Accordingly, he ordered Doherty to file an analysis supported by documentation to determine the amount of interest Torres had lost.[31] At the suggestion of Judge Buchmeyer, Chief Judge of the Northern District of Texas, Doherty wrote a letter to Judge McBryde expressing shock and disappointment that Judge McBryde believed it to be necessary to enter an order to compensate Torres.[32] Judge McBryde responded with an order striking Doherty's letter as

21. *Id.* at 213.
22. *Id.*
23. *Id.*
24. *Id.* at 214.
25. *Id.*
26. *Id.*
27. *Id.*
28. Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. §§ 2671-2680 (1999)).
29. *McBryde I*, 117 F.3d at 214.
30. *Id.*
31. *Id.*
32. *Id.*

bordering on, if not constituting, contempt and demanding that she file the requested documentation calculating the lost interest.[33]

Shortly after these events concerning the *Satz* and *Torres* cases, Judge Buchmeyer entered orders vacating Judge McBryde's orders and reassigned both cases to himself.[34] A month later, Judge Politz, Chief Judge of the Fifth Circuit and Chairman of the Judicial Council of the Fifth Circuit, convened a meeting with Judge McBryde and Judge Buchmeyer to attempt to resolve the disputes surrounding *Satz* and *Torres*.[35] Judge McBryde declared that he would seek the assistance of the Judicial Council in returning the two cases to his docket, to which Judge Politz replied that such a request would result in a plenary investigation of Judge McBryde's career as a judge.[36] Nevertheless, Judge McBryde filed a request for assistance in June 1995, one month prior to the filing of a complaint by an attorney with the Judicial Council.[37]

Pursuant to section 372(c),[38] Judge Politz appointed a Special Committee to investigate the allegations of malfeasance.[39] As a reaction to the swelling number of complaints of Judge McBryde's abusive and excessive conduct, Judge Politz elected to expand the scope of the investigation pursuant to section 372(c)(5).[40] After reviewing evidence regarding numerous incidents spanning Judge McBryde's career as a judge, the Special Committee identified five categories in which Judge McBryde's pattern of conduct could be placed: (1) proclivity to question authority; (2) overreactions and abusive sanctions; (3) obsessive need to control; (4) inappropriate conduct towards fellow judges; and (5) effect on the legal community.[41] Ultimately, the Special Committee recommended that Judge McBryde either retire voluntarily or face sanctions, viz. a public reprimand, suspension of all new assignments for one year, and disqualification for three years in any case involving a lawyer whom the Special Committee had identified as a potential witness at its hearing.[42]

The Judicial Council for the Fifth Circuit adopted the Special Committee's findings of fact and recommendations as to appropriate sanctions.[43] Judge McBryde thereafter filed seven petitions for review with the Committee to Review Circuit Council Conduct and Disability Orders of the Judicial

33. *Id.* at 215.
34. *Id.*
35. *McBryde III*, 83 F. Supp. at 142.
36. *Id.*
37. *Id.*
38. *See infra* Part III(B).
39. *McBryde III*, 83 F. Supp. at 142.
40. *Id.* at 143.
41. *Id.*
42. *Id.* at 147.
43. *Id.* at 147-48.

Conference of the United States (the Review Committee) pursuant to section 372(c)(10).[44] The Review Committee substantially affirmed the Judicial Council's order, though authorizing the Judicial Council to lift the one-year period of Judge McBryde's new case assignment sanction if it found Judge McBryde's behavior demonstrated that he had engaged in honest reflection and self-appraisal to improve his conduct and that he had made substantial progress towards that end.[45]

Judge McBryde turned to the U.S. District Court for the District of Columbia to challenge the constitutionality of the Act both facially and as applied.[46] The district court held the Act not facially unconstitutional under the separation of powers doctrine, insofar as the powers exercised by the judicial branch under the auspices of the Act are compatible with the central aim of the branch—the administration of justice by equitable applications of the law.[47] In addition, the district court declared that no other branch of government could perform the Act's essential monitoring function without raising grave separation of powers objections.[48] In construing the finality clause of the Act, section 372(c)(10),[49] the court found that the Act precluded review of Judge McBryde's statutory claims, however his right to challenge the constitutionality of the Act, both facially and as-applied, remained intact.[50]

44. *Id.* at 149. Section 372(c)(10) provides:

> A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

45. *McBryde III*, 83 F. Supp. at 149.

46. *Id.* at 139. Judge McBryde's complaint rested on the grounds that the Act violates the separation of powers doctrine both facially and as-applied, fails to accord him due process of law in its application, and violates the First Amendment. Furthermore, Judge McBryde argued that the proceedings against him violated the Act and the Fifth Circuit's Complaint Rules.

47. *Id.* at 155 (citing Mistretta v. United States, 488 U.S. 361, 388 (1989)).

48. *Id.* (citing *In re* Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit, 783 F.2d 1488, 1505 (11th Cir. 1986)).

49. *See supra* note 44.

50. The District Court based its conclusion on language found in three D.C. cases involving the infamous Judge Hastings—*Hastings v. Judicial Conference of the United States*, 593 F. Supp. 1371, 1378 (D.D.C. 1984) (holding that the "Act does not bar judicial review of the facial validity of the statute itself"), *aff'd in part and vacated in part*, 770 F.2d 1093, 1109 (D.C. Cir. 1985) (Edwards, J., concurring) (raising issues regarding any interpretation of § 372(c)(10) that would preclude constitutional claims) [hereinafter Hastings I]; *Hastings v. Judicial Conference of the United States*, 829 F.2d 91, 108 (D.C. Cir. 1987) (on the issue of whether the court could pass on

Turning then to the Act as applied by the Judicial Council, the district court concluded that the Act was not unconstitutionally applied because the investigation of Judge McBryde did not enter into the protected sphere of judicial decision making through an inquiry into the merits of Judge McBryde's rulings and because Judge McBryde was not effectively removed from office.[51]

Having unsuccessfully petitioned the D.C. District Court for relief from the Review Committee's Order, Judge McBryde appealed.[52] Before turning to the majority and dissenting opinions in *McBryde IV*, however, it may be helpful to briefly survey the legislative history of the Act and its relevant provisions vis-à-vis Judge McBryde.

## III. The Act

### *A. History of the Act*

Congress created the judicial councils[53] for each circuit in 1939 with the enactment of 28 U.S.C. § 448,[54] which dictated that at least twice a year a council composed of circuit judges, led by the senior circuit judge, would convene to ensure the proper administration of the business of their respective courts.[55] Congress recodified and revised this legislation in 1948 when it enacted 28 U.S.C. § 332,[56] which provided in part that "[e]ach judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit."[57] Every employee and officer of the circuit, including, of course, the circuit judges, must "promptly carry into effect all orders of the judicial circuit."[58]

plaintiff's due process challenges to the Act as-applied, noting that "sensitive and unsettled questions of constitutional law would arise if the challenged actions are covered by the prohibition on judicial review").

51. *McBryde III*, 83 F. Supp. at 159-65.

52. On appeal, Judge McBryde repeated the essence of his arguments raised before the D.C. District Court, save his First Amendment argument, which the District Court accepted. *McBryde IV*, 264 F.3d at 55.

53. For extensive background relating to judicial councils, see PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION (1973); *see also* Peter G. Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. CHI. L. REV. 203 (1970).

54. Act effective Aug. 7. 1939, ch. 501, 53 Stat. 1223 (codified as amended at 28 U.S.C. 332 (1946)).

55. *McBryde I*, 117 F.3d at 226.

56. *Id.*

57. 28 U.S.C. § 332(d)(1) (Supp. II 1996).

58. § 332(d)(2).

The statutory conferral of authority to judicial councils was challenged in *Chandler v. Judicial Council of the Tenth Circuit*.[59] The Judicial Council of the Tenth Circuit in *Chandler* convened in a special session and found that Judge Chandler was unable to "discharge efficiently the duties of his office." Thus, the Judicial Council ordered, pursuant to section 332, that all cases filed after December 28, 1965 be assigned to other judges.[60] Judge Chandler, a district court judge, challenged the authority of the Judicial Council to issue such an order and petitioned the Supreme Court for an extraordinary writ, arguing that the Council usurped congressional impeachment power.[61] Although the Court rejected the petition for an extraordinary writ,[62] *Chandler* has become a seminal decision for judicial scholars because it marked the inception of the debate over the dynamic between judicial independence and the need for accountability to ensure the effective and expeditious administration of the courts.[63]

In 1978, in the wake of incessant criticism of the judicial councils, Senators Nunn and Deconcini co-sponsored S. 1423,[64] a bill that included removal, a Judicial Conduct and Disability Commission, and a Court on Judicial Conduct and Disability. Although the Judicial Conference of the United States (the Judicial Conference)[65] approved S. 1423[66] and the Senate

59. 398 U.S. 74 (1970).

60. *Chandler*, 398 U.S. at 77-81.

61. *Id.* at 82.

62. *Id.* at 86-88.

63. Chief Justice Burger argued that impeachment cannot be the only means of sanctioning judges that refuse to abide by the "reasonable, proper, and necessary" rules promulgated by judicial councils to establish orderly administration of court business. *Id.* at 85. Justice Harlan, in concurrence, conceded the profound importance of judicial independence in the American scheme of government, but noted that there existed "no incursion on that principle in the legislation creating the Judicial Councils and empowering them to supervise the work of the district courts, in order to ensure the effective and expeditious handling of their business." *Id.* at 129. Justices Douglas and Black, on the other hand, emphasized the all-encompassing independence of judges and maintained that judicial councils infringe upon the constitutionally mandated impeachment power of Congress. *Id.* at 136, 141-42.

64. 95th Cong. (1978).

65. The Judicial Conference of the United States was established under 28 U.S.C. § 331 (1993), which states that the Chief Justice of the United States Supreme Court must summon annually the chief judge of each circuit to a conference that will survey the condition of the courts, make appropriate recommendations, and exercise authority pursuant to § 372(c). Either the Judicial Conference or a standing committee of the Conference may hold hearings and issue orders as necessary to accomplish its duties.

66. Suggested amendments and a constitutional warning regarding removal accompanied Conference approval. *See* Stephen B. Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 293 (1982).

passed it, the House balked at the Nunn/Deconcini bill, perhaps because enacting the bill would have in effect rejected the contention held by the organized federal judiciary that it was capable of self-regulation within the existing structure.[67] Indeed, the bill hardly espoused the notion of decentralized judicial administration that remained constant since the nascence of judicial councils.[68] In the aftermath of S. 1423, Senators Bayh and Kennedy each introduced bills[69] that rejected removal by methods outside of those enumerated in the Constitution while embracing the idea that resolution of allegations of less-than-impeachable malfeasance may be accomplished by the judiciary acting through existing machinery.[70]

Although the Nunn/Deconcini bill and the alternatives proposed by Senators Bayh and Kennedy ultimately failed to garner support, continued doubts about the adequacy of existing procedures caused members of the Senate to cooperate with representatives of the Judicial Conference in drafting a new bill, S.1873.[71] The bill departed from the Nunn/Deconcini conception insofar as it refused to authorize removal and it provided the judicial councils with primary responsibility.[72] The considerable moderation, however, of S. 1873 proved to be insufficient for the Judicial Conference, which elected not to accept the bill due to its divergence from the model of federal judicial administration.[73] The bill would have recreated the special Article III court first conceived in the Nunn/DeConcini bill, the Court on Judicial Conduct and Disability, which was to be endowed with the power to review misconduct findings of the judicial councils de novo.[74] In the face of stout Judicial Conference opposition, S. 1873 passed with considerable difficulty on the Senate floor.[75]

The House used H.R. 6330,[76] which the Judicial Conference had approved, as its paradigm in drafting legislation aimed at the judiciary.[77] Like the Bayh and Kennedy bills, H.R. 6330 imparted upon the judicial councils primary responsibility to settle complaints of judicial misconduct or disability.[78] The Bayh bill and H.R. 6330, moreover, featured initial screening of complaints by

67. Burbank, *supra* note 66, at 293-94.

68. *Id.*

69. S. 522, 96th Cong. (1979); S. 678, 96th Cong. (1979), respectively.

70. Burbank, *supra* note 66, at 294.

71. 96th Cong. (1979).

72. Burbank, *supra* note 66, at 297.

73. *Id.*

74. S. 1873 § 2(a).

75. *See* 125 CONG. REC. 30,052-53 (1979). The bill passed 56-33, with 11 Senators not voting. *Id.* at 30,100.

76. 96th Cong. (1980).

77. Burbank, *supra* note 66, at 300.

78. *Id.*

the chief judge as a means of economical, informal, and collegial resolution of complaints.[79] Keeping the analytical framework of H.R. 6330 in mind, it is no surprise that the House version of S. 1873 eviscerated the Court on Judicial Conduct and Disability and called instead for review of council findings by the Judicial Conference.[80] The House Judiciary Committee expressed concern over the formality of a special court and its propensity to invite excessive complaints against judges, thereby threatening judicial independence.[81]

Signed into law by President Carter on October 15, 1980,[82] the Act was designed to establish a mechanism and procedures within the federal judiciary to consider and reply to complaints against particular judges.[83] Congress also wished to revise the composition of the judicial councils of each circuit, while simultaneously affirming the authority of both the councils and the Judicial Conference in the sphere of judicial discipline and disability.[84] The Act sought to enhance judicial ethics and accountability, to bolster the tenet that the appearance of justice is crucial to the American justice system, and to preserve the autonomy of the judiciary.[85]

### *B. Provisions of the Act*

The Act provides for investigation by the federal judiciary of charges that a circuit, district, or bankruptcy judge or magistrate has engaged in conduct detrimental to the effective and efficient administration of the duties of the courts.[86] Under the provisions germane to this Note, any person alleging such conduct may file with the Circuit Court of Appeals a written complaint containing a cursory statement of the facts comprising the conduct.[87] The chief judge of the circuit reviews the complaint "expeditiously" and then may choose one of three options.[88] Initially, the chief judge may dismiss the complaint: (1) when it fails to conform to procedural requirements; (2) when it

79. *Id.*

80. H.R. 7974, 96th Cong. § 3(c)(10) (1980).

81. *See* H.R. REP. NO. 96-1313, at 18 (1980):

In essence, the Committee rejected the special court feature of S. 1873 and certain other of its features because creation of a system in which complaints against federal judges could be so easily pressed to a formal adversary accusatorial proceeding raised the dangers of a substantial chilling effect on judicial independence, as well as the danger of infliction of harm and disruption of the administration of justice.

82. *See* Edward D. Re, *Judicial Independence and Accountability: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 8 N. KY. L. REV. 221, 243 (1981).

83. H.R. REP. NO. 96-1313, at 1.

84. *Id.*

85. *Id.*

86. *See* § 372(c)(1).

87. § 372(c)(1).

88. § 372(c)(3).

directly relates to the merits of a decision or procedural ruling; or (3) when it is frivolous.[89] Alternatively, the chief judge may conclude the proceeding upon a finding that suitable corrective action has been taken or that superseding events render action on the complaint unnecessary.[90] Lastly, the chief judge may choose neither of these options, in which case she shall appoint herself and an equal number of circuit and district judges of the circuit to a special committee to probe the facts and allegations of the complaint.[91]

Once a special committee is appointed, the Act dictates that it shall conduct an investigation to such an extent as it deems necessary and shall quickly thereafter file a report with the judicial council of the circuit.[92] The report must exhibit both the findings of the investigation and the committee's proposals for necessary and proper action by the judicial council.[93] Upon receipt of this report, the judicial council may spearhead any additional investigation which it considers necessary and shall take such action as it deems appropriate to ensure the effective and expeditious administration of the matters of the courts within the circuit.[94]

A party aggrieved by a final order of the chief judge may petition the judicial council for review, while a party aggrieved by an action of the judicial council may petition the Judicial Conference for review.[95] The Judicial Conference has discretion to grant or deny a petition for review, and its orders and resolutions are final and therefore *not* subject to judicial review.[96]

## IV. THE MAJORITY AND DISSENTING OPINIONS IN MCBRYDE IV

89. § 372(c)(3)(A).

90. § 372(c)(3)(B).

91. § 372(c)(4).

92. § 372(c)(5).

93. *Id.*

94. § 372(c)(6). This provision also outlines seven available courses of action for a judicial council to take, though the list is not meant to be exhaustive: (1) direct the chief judge of the district of the magistrate whose conduct is the focus of the complaint to take such action as the judicial council considers proper; (2) certify disability of a judge whose conduct is the focus of the complaint pursuant to the procedures and standards enumerated under subsection (b) of §372; (3) request that any judge voluntarily retire; (4) order that no further cases be assigned to any judge whose conduct is the focus of the complaint on an impermanent basis for a specified time; (5) admonish such judge privately; (6) admonish such judge publicly; or (7) order any other action the council deems appropriate, notwithstanding removal. *Id.* The first three options relate either to magistrates or to judges eligible for retirement. Additional provisions of the Act allow a judicial council to refer any complaint to the Judicial Conference and in those cases entailing impeachable offenses require such action. *See* § 372(c)(7).

95. § 372(c)(10); *see supra* note 44.

96. *Id.*

### *A. The Majority Opinion*

The majority opinion in *McBryde IV*, written by D.C. Circuit Judge Williams, began by determining that Judge McBryde's claims were moot insofar as they related to the one-year suspension and the three-year disqualification.[97] The majority found that, since both the suspension and disqualification had expired, no relief sought by McBryde from the Fifth Circuit would return the cases to him he was not assigned or "otherwise improve his current situation."[98] In discussing mootness and standing, Judge Williams stated that McBryde attacked the Special Committee's report as vague because it provided insufficient notice of what constitutes prohibited conduct.[99] He concluded, however, that the fundamental standard sought to be enforced by the Review Committee and the Judicial Council of the Fifth Circuit was clearly ascertainable.[100] The standard, announced in the Order of the Judicial Council, states that "a judge should demonstrate at least a modicum of civility and respect towards the professionals with whom he or she works."[101]

The court encountered two jurisdictional issues—whether McBryde lacked standing and the scope of the applicability of the review preclusion clause of the Act.[102] Addressing Judge McBryde's facial constitutionality claims first, the majority compared the preclusive language of section 372(c)(10) with the statutory language construed in *Johnson v. Robinson*[103] and determined that section 372(c)(10) did not deny jurisdiction over facial challenges.[104] Turning then to the question of whether Judge McBryde's as-applied constitutionality claims were barred under section 372(c)(10), Judge Williams relied heavily upon a series of D.C. Circuit cases known as the *Ralpho* trilogy and upon the legislative history of the Act.[105]

97. *McBryde IV*, 264 F.3d at 55.

98. *Id.* The one-year suspension expired on September 18, 1999, while the three-year disqualification expired on February 6, 2001. *Id.* The majority went on to find that Judge McBryde's claims were *not* moot insofar as they related to the public reprimand because of the reprimand's stigmatizing effect. *Id.* at 56-57.

99. *Id.* at 56.

100. *Id.*

101. *Id.*

102. *Id.* at 58.

103. 415 U.S. 361, 367-68 (1974) (construing then-applicable version of 38 U.S.C. § 211(a), which provided that decisions of the Veteran's Administration on any question of law or fact under certain laws shall be final and conclusive, and holding that § 211(a) had no application to challenges to the constitutionality of the statutes in question).

104. *McBryde IV*, 264 F.3d at 58.

105. *Id.* at 59-63.

The *Ralpho* trilogy, *Griffith v. FLRA*,[106] *Ungar v. Smith*,[107] and *Ralpho v. Bell*,[108] stands for the principle that courts should find preclusion of review for as-applied and facial constitutional challenges only if evidence exists to show clear and convincing congressional intent to preclude.[109] In each case, broad and ostensibly comprehensive statutory language barring review faced the D.C. Circuit.[110] In the absence of unequivocal statutory language precluding review of constitutional claims, the D.C. Circuit chose in all three cases to analyze the legislative history.[111] In each case, furthermore, the court found the clear and convincing standard unsatisfied.[112]

The legislative history of the Act, the majority argued, exhibits concern over the issue articulated in *Robinson*, i.e., the constitutional implications of a federal statute that denies any judicial forum for a viable constitutional claim, and illustrates a congressional effort to ensure that sufficient review would occur in practice through the Act's mechanisms.[113] The Court on Judicial Conduct and Disability, envisioned in S. 1873,[114] was to be the constitutional safeguard for the Act against *Robinson* attacks.[115] When the House version abolished this special court in favor of review by the Judicial Conference, Congress retained the idea of an independent review body consisting of Article III judges.[116]

106. 842 F.2d 487 (D.C. Cir. 1988).

107. 667 F.2d 188 (D.C. Cir. 1981).

108. 569 F.2d 607 (D.C. Cir. 1977).

109. *McBryde IV*, 264 F.3d at 59. The Supreme Court has echoed the essence of this principle in *Webster v. Doe*, 486 U.S. 592, 603 (1988) (construing § 102(c) of the National Security Act of 1947 in conjunction with 5 U.S.C. § 701(a) and holding that a discharged employee's constitutional claims were judicially reviewable under 5 U.S.C. § 706) (citing *Robinson*, 415 U.S. at 373-74).

The majority in *McBryde IV* conceded that the Supreme Court decision in *Traynor v. Turnage*, 485 U.S. 535, 542-45 (1988), may have subverted the principle of the *Ralpho* trilogy by viewing the *Robinson* decision, which was the source of the principle, as deriving more from statutory language permitting review of challenges on the facial constitutionality of statutes being applied and less from the notion that constitutional challenges occupy a special status. *McBryde IV*, 264 F.3d at 59-60. Nevertheless, the majority assumed that the *Ralpho* trilogy principle remained in full effect for the purposes of its argument. *Id.* at 60.

110. *See Griffith*, 842 F.2d at 490 (citing Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1119 (codified as amended at 28 U.S.C. § 7123(a) (Supp. III 1983))); *Ungar*, 667 F.2d at 192-93 (citing 22 U.S.C. § 1631o(c) (1976)); *Ralpho*, 569 F.2d at 613 (citing 50 U.S.C. § 2020 (1972)).

111. *Griffith*, 842 F.2d at 494-95; *Ungar*, 667 F.2d at 195-96; *Ralpho*, 569 F.2d at 621-22.

112. *Id.*

113. *McBryde IV*, 264 F.3d at 60-61.

114. *See supra* Part III(A).

115. *McBryde IV*, 264 F.3d at 60 (citing 125 CONG. REC. 30,050/1 (1979) (statement of Sen. DeConcini)).

116. *Id.* at 60-61; *see supra* Part III(A).

The majority offered two final arguments in support of the position that section 372(c)(10) of the Act clearly and convincingly precludes review of as-applied constitutional claims.[117] First, while agencies normally lack jurisdiction to adjudicate the constitutionality of congressional enactments, they are obliged to tackle properly presented constitutional claims that refrain from challenging agency actions ordered by Congress.[118] According to the majority, Congress did not withdraw this obligation from the Judicial Conference.[119] Second, since a sanctioned judge may petition the Judicial Conference for review of all claims except facial challenges to the Act, to interpret section 372(c)(10) to permit review of as-applied challenges by traditional courts would result in substantial redundancy.[120]

By holding that section 372(c)(10) barred review of Judge McBryde's as-applied constitutional claims, the majority sought to further what it viewed as the objectives of this provision of the Act.[121] These objectives included conforming to *Robinson*, fulfilling both the presumption in favor of access to Article III review of constitutional challenges and the rule dictating that agencies avoid unconstitutional applications not congressionally mandated, and preventing unnecessary prolongation of the disciplinary process.[122]

### *B. Tatel's Dissent*

The preclusion clause of the Act operated as the point of contention between the majority opinion and Judge Tatel's dissent.[123] Judge Tatel argued: (i) that the preclusion clause did not bar judicial review of as-applied challenges; (ii) that the Judicial Council of the Fifth Circuit's Report was ambiguous as to what conduct of Judge McBryde was clearly abusive; (iii) that using such an ambiguous Council Report as a foundation for sanctions risks chilling judges' ability to manage courtrooms effectively; and (iv) that a new standard by which to sanction judges should be employed by the Act.[124]

Judge Tatel, like the majority, relied upon the *Ralpho* trilogy in analyzing section 372(c)(10).[125] In *Ungar* and *Ralpho*, the D.C. Circuit found statutes

117. *Id.* at 62.

118. *Id.* (citing Graceba Total Communications, Inc. v. F.C.C., 115 F.3d 1038, 1042 (D.C. Cir. 1997)).

119. *Id.* The concept of judicial councils and the Judicial Conference as administrative agencies will be explored in Part V(A).

120. *Id.* Substantial redundancy is naturally regarded by the Court as an implausible legislative purpose.

121. *Id.* at 63.

122. *Id.*

123. *See id.* at 73 (Tatel, J., dissenting).

124. *Id.* at 69, 80 (Tatel, J., dissenting).

125. *Id.* at 73-76 (Tatel, J., dissenting).

containing language just as preclusive as that of section 372(c)(10) inadequate to prevent review of as-applied constitutional challenges.[126] Judge Tatel attacked the majority's inference, formed from S. 1873 and its accompanying legislative history, that Congress intended preclusion of as-applied claims, by noting that both *Griffith* and *Ungar* refrained from considering such inferences from prior versions of bills as adequately clear evidence of congressional intent to bar review of as-applied claims.[127]

*Griffith* and *Ungar* also undermined the majority's belief that preclusion of constitutional claims would further the statutory purpose of preventing undue prolongation of the disciplinary process.[128] In each case, the D.C. Circuit found review preclusion statutes intended to accomplish similar goals insufficient to prove unequivocal congressional intent to bar judicial review of as-applied constitutional challenges.[129]

The legislative history of the Act, moreover, implied movement away from preclusion.[130] Senator DeConcini informed Congress that it may safely preclude judicial review of constitutional claims under *Robinson* only if

126. Ungar v. Smith, 667 F.2d 188, 193 (D.C. Cir. 1981) (determinations made under 22 U.S.C. § 1631o(c) were to be "final" and "not . . . subject to review by any court"); *Ralpho*, 569 F.2d at 613 (the statute provided that "[administrative decisions] shall be final and conclusive for all purposes, notwithstanding any other provision of law to the contrary[,] and not subject to review").

127. *McBryde IV*, 264 F.3d at 74 (Tatel, J., dissenting).

In *Griffith v. Federal Labor Relations Authority*, the Senate bill established that decisions of the Federal Labor Relations Authority would be final and conclusive and thus not subject to judicial review, yet an exception existed for constitutional questions. 842 F.2d 487, 495 (D.C. Cir. 1988). The conference committee elected to reject the House's proposal for extensive judicial review and generally to adopt the Senate's restrictive methodology, however in the process it eliminated without explanation the exception for constitutional questions. *Id.* The D.C. Circuit held that "[t]his silent deletion [was] not enough . . . to support an inference of intent to preclude constitutional claims." *Id.*

In *Ungar*, the issue was whether Justice Department decisions concerning claims for the return of assets vested in the Office of Alien Property were subject to judicial review. 667 F.2d at 190, 193. In determining that the finality clause of 22 U.S.C. §1631 did not bar judicial review of as-applied claims, the D.C. Circuit stated that "[a]n earlier version of the bill . . . included an elaborate scheme for trial of just-compensation claims in the Court of Claims" which was "deleted on the House floor for reasons that are not wholly plain." *Id.* at 195 n.2. The Court was "not willing to regard this as clear evidence of Congressional intent" to preclude review. *Id.*

128. *McBryde IV*, 264 F.3d at 76 (Tatel, J., dissenting).

129. *See Griffith*, 842 F.2d at 495 (Congress' plan to limit judicial review of FLRA decisions was intended to advance "finality, speed[,] and economy," yet as-applied constitutional claims were nevertheless not precluded); *Ungar*, 667 F.2d at 195-96 (Congress intended the review preclusion provision to reduce delay in adjudicating claims under the Trading with the Enemy Act, but such intent did not operate as a "clear expression of Congress' desire to prevent the courts from passing upon . . . constitutional claims").

130. *McBryde IV*, 264 F.3d at 74 (Tatel, J., dissenting).

"litigants at some point [have] access to an Article III court."[131] In vesting review of judicial council decisions in the Judicial Conference rather than in a special court, the House Judiciary Committee noted that it was shifting from a "court" to an "administrative model."[132] Upon the Act's return to the Senate, Senator DeConcini reiterated this notion of movement towards an administrative model by explaining that the Judicial Conference, unlike the Senate's proposed Court on Judicial Conduct and Disability, was not an independent review court.[133] According to Judge Tatel, these events of the Act's legislative history suggest Congress would have understood that vesting review power in the Judicial Conference exposed judicial council disciplinary decisions to constitutional attack in the federal courts.[134]

By concluding that section 372(c)(10) fails to preclude review of as-applied constitutional challenges against judicial council sanctions, Judge Tatel felt compelled to address the merits of Judge McBryde's as-applied claims.[135] He found the Report of the Judicial Council of the Fifth Circuit unclear because it neglected to explain thoroughly and explicitly the ways in which Judge McBryde's behavior deviated from permissible exercises of judicial power.[136] The Judicial Council of the Fifth Circuit, Judge Tatel concluded, violated the Constitution by infringing upon judicial independence in imposing sanctions on Judge McBryde.[137]

Judge Tatel therefore proposed that judicial council sanctions "should be employed only for conduct that, viewed from the perspective of reasonable judges and lawyers, is clearly abusive toward counsel or clearly prejudicial to the adversarial process.[138] Such an arduous, objective standard is necessary for four reasons: (1) absent a precise standard, judicial councils could more easily employ their disciplinary power to sanction nonabusive judicial conduct; (2) some judicial council members, e.g. appellate judges, may have a dearth of experience in facing aggressive trial lawyers who push the limits of appropriate

131. 125 CONG. REC. 30,050/1 (1979) (statement of Sen. DeConcini).

132. *See* H.R. REP. NO. 96-1313, at 14 (stating that this "legislation creates much more of an 'inquisitorial-administrative' model than an 'accusatorial-adversary' one"); *see also infra* Part V(A).

133. 126 CONG. REC. 28,090 (1980) (statement of Sen. DeConcini).

134. *McBryde IV*, 264 F.3d at 75 (Tatel, J., dissenting). Judge Tatel also believed these legislative historical events constitute "primary evidence" of legislative intent that outweighs any inferences the majority drew from whatever functional redundancy which may result from concluding that federal courts may review as- applied challenges to § 372(c). *Id.* at 76 (Tatel, J., dissenting).

135. *Id.* at 76 (Tatel, J., dissenting).

136. *Id.* at 82-84 (Tatel, J., dissenting).

137. *Id.* at 69 (Tatel, J., dissenting).

138. *Id.* at 80 (Tatel, J., dissenting).

advocacy; (3) judicial discipline can chill the exercise of judicial discretion; and (4) sanctions can potentially damage an individual's reputation.[139]

## V. ANALYSIS

### *A. The Preclusion Clause*

After reviewing both the majority and dissenting opinions in *McBryde IV*, the question of which approach to the preclusion clause of the Act with respect to as-applied constitutional challenges is most accurate remains unanswered. Since only a few reported cases have even attempted to construe the preclusion clause,[140] each opinion relies adroitly on the legislative history of the Act in resolving the issue.[141] While neither opinion appears to emphatically resolve the issue while sufficiently rebutting the other side's arguments, upon careful examination Judge Tatel's approach more accurately pursues the proper line of reasoning. The majority in *McBryde IV* failed to explain adequately the inconsistency between its interpretation of the congressional intent underlying section 372(c)(10) and the Supreme Court's mandate in *Robinson*[142] that constitutional challengers must be granted access to an Article III court.

Judge Tatel emphasized Congress' awareness of the *Robinson* issue by virtue of Senator DeConcini's introduction of the report prepared by Johnny H. Killian, an American law expert at the Library of Congress.[143] This fact is indeed important to the resolution of the preclusion clause issue, for it is the first step in understanding the congressional intent to allow for judicial review of as-applied claims under the Act. Judge Tatel began to take the second step by identifying the Judicial Conference as an administrative body,[144] however his reasons for such an identification could have been far more formidable.

Stated simply, the Judicial Conference is undoubtedly an administrative body[145] and Congress knew that vesting authority to review disciplinary

139. *Id.* at 80-81 (Tatel, J., dissenting).

140. *See McBryde II*, 120 F.3d at 520 n.1 (noting in dicta that any arguments "concerning dismissal of Judicial Conference proceedings should be directed to that body and not to this court"); Hastings I, 593 F. Supp. 1371, 1377-78 (D.D.C. 1984), *aff'd in part and vacated in part*, 770 F.2d 1093 (D.C. Cir. 1985).

141. *See supra* Part IV.

142. *See supra* Part IV(A).

143. *See McBryde IV*, 264 F.3d at 74-75 (Tatel, J., dissenting); 125 CONG. REC. 30,050/1 (1979) (statement of Sen. DeConcini).

144. *See McBryde IV*, 264 F.3d at 75 (Tatel, J., dissenting); *see also supra* Part IV(B).

145. Congress, the courts, and scholars agree that the Judicial Conference and the judicial councils are administrative bodies. *See, e.g.*, Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 435 n.2 (1985) (the judicial councils "exist 'to provide an administrative remedy for misconduct of a judge for which no judicial remedy is available'"); *Chandler*, 398 U.S. at 86 n.7 ("the [j]udicial [c]ouncil was intended to be . . . an administrative body functioning in a very limited

decisions in an administrative body would not satisfy *Robinson*.[146] An administrative body is hardly an Article III court.[147] Accordingly, when Congress elected to grant the power to review judicial council administrative decisions to the Judicial Conference, it intended to permit as-applied and facial constitutional challenges to the Act in federal courts. Any other interpretation would mean that Congress intentionally ignored the Supreme Court opinion in *Robinson*. Aside from his lack of emphasis on the Judicial Conference *qua* administrative agency, Judge Tatel's dissent failed to address a significant argument made by the majority. The majority stated that administrative agencies have an obligation to address constitutional claims that do not challenge agency actions ordered by Congress under *Graceba*.[148] The majority then concluded that Congress has not withdrawn this obligation from the Judicial Conference.[149] This argument, however, assumes that all as-applied constitutional claims do not challenge agency actions mandated by Congress. The case of Judge McBryde demonstrates that such an assumption is false.

Judge McBryde's second as-applied constitutional claim consisted of the argument that the methods employed by the Judicial Council of the Fifth Circuit and the Judicial Conference were especially invasive and constituted a violation of judicial independence.[150] Yet it was Congress who established the standard and methodology to be used by judicial councils and the Judicial Conference in disciplinary proceedings initiated pursuant to section 372(c).[151] In effect, therefore, Congress mandated Judicial Council and Judicial Conference actions in the McBryde saga by prescribing the agencies' *modus operandi* in section 372(c). *Graceba* will not apply to Judge McBryde's second as-applied claim because the claim challenges actions and procedures mandated by Congress.

area in a narrow sense as a 'board of directors' for the circuit"); Henry v. U.S., 432 F.2d 114, 119-20 (9th Cir. 1970) ("[i]t is true that members of a Court of Appeals, meeting as a Judicial Council, exercise certain supervisory powers for the expeditious administration of the business of the courts within its circuit, but they act as a council, not a court); H.R. REP. NO. 96-1313, at 4 ("rather than creat[ing] luxurious mechanisms such as special courts and commissions—with all the trappings of the adversary process, including legal counsel, written transcripts, discovery and cross-examination—the [House version of the bill] emphasize[s] placing primary responsibility within the judicial branch of government"); Burbank, *supra* note 66, at 306; Re, *supra* note 82, at 250.

146. *See supra* Part IV(B).

147. Senator DeConcini has also uttered this tautology, see *supra* note 131.

148. *See McBryde IV*, 264 F.3d at 62; *see also supra* Part IV(A).

149. *Id.*

150. *Id.* at 58.

151. While judicial councils and the Judicial Conference are free to prescribe rules for the conduct of proceedings under § 372(c)(11), it remains clear that judicial councils and the Judicial Conference are to use the standard provided in § 372(c)(1) in evaluating judicial conduct.

An interpretation of the preclusion clause that allows for preclusion of as-applied constitutional claims is irreconcilable with the Act's legislative history and the Supreme Court's jurisprudence.[152] Such an interpretation, moreover, clears the way for unbridled misapplication of the Act by judicial councils.

### *B. Proposed Standard for the Act*

Even if the preclusion clause of the Act does in fact bar judicial review of as-applied constitutional claims, the Act remains susceptible to recurring, unconstitutional misapplication by judicial councils and the Judicial Conference.[153] The problem lies in the Act's imprecise standard, which calls for sanctioning judicial conduct that is "prejudicial to the effective and expeditious administration of the business of the courts."[154] Without a more exact standard by which to evaluate judicial conduct, the independence of the judiciary may continue to be compromised by decisions like *McBryde IV*, which in effect validated an unconstitutional application of the Act.

If the Act is amended to clarify the standard of section 372(c)(1), what should the new standard be? The majority in *McBryde IV*, while approving the Judicial Conference's authority to sanction Judge McBryde and thus implicitly confirming the status quo, suggested a baseline standard "that a judge should demonstrate at least a modicum of civility and respect towards the professionals with whom he or she works."[155] Judge Tatel, on the other hand, proposed a reasonableness standard based upon the perspectives of judges and lawyers.[156] Somewhere between these recommendations lie proposals offered by scholars for amendments to the Act's standard of discipline.[157]

152. *See, e.g.*, *Robinson*, 415 U.S. at 367; *Webster*, 486 U.S. at 603.

153. *See* Patrick D. McCalla, Note, *Judicial Disciplining of Federal Judges is Constitutional*, 62 S. CAL. L. REV. 1263, 1291-92 (1989) (arguing that "[a] loosely defined disciplinary standard creates a risk of unequal application and unjustified extension to situations previously considered outside the jurisdiction of the Judicial Council"); *see also* RUSSELL R. WHEELER & A. LEO LEVIN, JUDICIAL DISCIPLINE AND REMOVAL IN THE UNITED STATES (1987). *But see* Carol T. Rieger, *The Judicial Councils Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges?* 37 EMORY L.J. 45, 56 (1988) (arguing the standard is clear if limited to criminal conduct, impeachable offenses and violations of the Code of Judicial Conduct).

154. § 372(c)(1); *see supra* note 8. Congress has provided little assistance in clarifying the disciplinary standard. Apparently, however, § 372(c)(1) does include impeachable behavior, criminal violations, and physical or mental disability. *See* H.R. REP. NO. 96-1313, at 10.

155. *McBryde IV*, 264 F.3d at 56.

156. *Id.* at 80 (Tatel, J., dissenting); *see supra* Part IV(B).

157. *See, e.g.*, Drew E. Edwards, Comment, *Judicial Misconduct and Politics in the Federal System: A Proposal for Revising the Judicial Councils Act*, 75 CAL. L. REV. 1071, 1090 (1987) (proposing the imposition of discipline only when a judge violates ethical standards such as those elaborated in the American Bar Association's Code of Judicial Conduct); McCalla, *supra* note 153, at 1292-93 (proposing a functional standard by which "a complaint may be filed alleging

The baseline standard offered by the majority in *McBryde IV* is too broad inasmuch as it fails to uphold the statutory goals of judicial accountability and ethics.[158] Almost any behavior may be deemed to constitute "a modicum of civility and respect." The standard, furthermore, would do nothing to regulate misconduct that is not blatantly disrespectful to others, e.g. subtle bias. The rigorous standard proposed by Judge Tatel is more appropriate, however he might not have gone far enough. A reasonableness standard would provide the exactness necessary to further most of the goals of the Act while avoiding unconstitutional applications, but Judge Tatel omitted a crucial perspective—that of the litigant.[159]

The Act's standard should be such that sanctions will be employed only for conduct that, viewed from the perspective of reasonable judges, lawyers, and litigants, is clearly abusive toward counsel or clearly prejudicial to the adversarial process. A reasonable litigant means a person whose understanding of the law encompasses an overarching conceptualization of substantial justice and the legal precepts applicable to her action as expounded by reasonable counsel.

The "reasonable litigant" addendum to Judge Tatel's proposed standard is necessary for three reasons. First, Congress identified judicial accountability to the public as an objective of the Act.[160] Judges, after all, are public servants and have an interest in ensuring that the system they exemplify is at all times publicly exonerated.[161] In addition, litigants are affected most by the outcome of the case. As the McBryde saga has demonstrated, a maverick judge may impede zealous advocacy, thereby directly impacting the outcome for the litigant.[162] Finally, an even more rigorous standard than that espoused by Judge Tatel is necessary to filter out frivolous claims. During the year ending September 30, 2000, the Administrative Office of the U.S. Courts reported 696 complaints filed under section 372(c) and another 715 complaints resolved or

misconduct in office or persistent failure to perform the duties of the office due to physical or mental disability or otherwise").

The problem with the Edwards standard is that it fails to promote judicial competence and focuses too narrowly on proscribing unethical behavior. The functional standard proposed by McCalla is deficient insofar as it allows a McBryde-like judge to turn his courtroom into a despotic kingdom, where the duties of the court are indeed performed, albeit with a severe chill on advocacy.

158. *See* H.R. REP. NO. 96-1313, at 1.

159. *See McBryde IV*, 264 F.3d at 80 (Tatel, J., dissenting); *see supra* Part IV(B).

160. *See* H.R. REP. NO. 96-1313, at 1.

161. *See In re* Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit, 783 F.2d 1488, 1507 (11th Cir. 1986).

162. *See McBryde III*, 83 F. Supp. at 146.

concluded.[163] A standard demanding satisfaction from a reasonable litigant's perspective may reduce the expense and disruption associated with frivolous claims filed under the Act.[164]

## VI. CONCLUSION

The story of Judge McBryde raises a disturbing question concerning many of the claims of judicial misconduct that are dismissed each year by chief judges and judicial councils.[165] How many of those claims are dismissed based on a misunderstanding of the Act's standard? The goals of the Act and public confidence in the judicial system certainly cannot be advanced by applications of the Act's machinery and standard that unconstitutionally infringe upon judicial independence.[166] Following *McBryde IV*, federal judges can only wonder what conduct is sufficiently prejudicial under the Act to trigger disciplinary proceedings. The judicial councils may now continue to apply the equivocal disciplinary standard provided in the Act, with only the Judicial Conference, reviewing under the same standard, as a safeguard against improper applications.

To assure that judicial independence remains a constant, unobstructed feature of the judicial system, Congress should amend section 372(c)(1) of the Act to provide that conduct clearly abusive toward counsel or clearly prejudicial to the adversarial process in the eyes of reasonable judges, lawyers, and litigants may be subject to discipline. Judges held by this standard will remain accountable to the public whom they serve and will be free to administer the business of their courts as autonomously as the Framers of the Constitution imagined.

BENJAMIN F. WESTHOFF*

163. *See* LEONIDAS RALPH MECHAM, 2000 REPORT OF THE DIRECTOR (2000), TABLE S-22, *available at* http://www.uscourts.gov/judbus2000/tables/s22sep00.pdf (Report of Complaints Filed and Action Taken Under Authority of Title 28 U.S.C. § 372(c)).

164. For an outstanding analysis of the effects of the administration of the Act on the courts, see Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, U. PA. L. REV. 25, 142-79 (1993).

165. During the year concluding September 30, 2000, chief judges dismissed 359 complaints and judicial councils dismissed 354 others. Mecham, *supra* note 163.

166. For a field study on the impact of the Act, pre-*McBryde IV*, on judicial independence, see Barr & Willging, *supra* note 164, at 173-77.

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